No. 96-795 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ALLENTOWN MACK SALES AND SERVICE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE LABOR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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22 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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The Labor Policy Association respectfully submits this brief as *amicus curiae* with the written consent of the parties.* The brief urges the Court to reverse the decision below and thus supports the position of the petitioner.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers,

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* Letters of consent from the parties have been filed with the Clerk of the Court.

collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.* Moreover, many LPA companies have in the past been, and will continue to be, successor employers of unionized workers. As such, LPA members are deeply concerned about the National Labor Relations Board's (NLRB or the Board) inconsistent and irrational application of federal labor policy in this case, whereby the Board imposed upon the parties a collective bargaining relationship that neither the workers nor management desired.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* in cases before this court, the United States Courts of Appeals, the United States District Courts, and the National Labor Relations Board. *E.g., NLRB v. Town & Country Elec.*, 116 S. Ct. 450 (1995) (whether union "salts" are employees under the NLRA); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994) (whether employee committees violate Section 8(a)(2) of the NLRA); *Gleoge v. Albertson's Inc.*, No. C96-3384 (N.D. Cal.) (decision pending) (enforceability of collectively-bargained agreeemnts to arbitrate statutory claims); *Jeffboat Div., American Commercial and Marine Serv. Co., et al.*, 9-UC-406 (NLRB) (decision pending) (employee/independent contractor distinction under the NLRA).

Thus, LPA has an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in Petitioner's brief.

SUMMARY OF ARGUMENT

In this case, Petitioner had a good-faith, reasonable doubt about the union's majority status prior to its decision not to bargain. In fact, Petitioner had conclusive and reliable proof that 59% of the employees in the bargaining unit no longer desired to be represented by the union. Faced with these circumstances, the Board applied a series of inconsistent and irrational rules which systematically "discredited" the evidence on which the employer based its good-faith reasonable doubt.

The patchwork of inconsistent and irrational actions that the Board took in order to reach its desired result in this case includes: applying a facially irrational rule that prohibits polling of employee sentiments except when it serves no purpose; applying a contradictory pair of rules that simultaneously require verification of individual employee sentiments and also prohibit verification of individual employee sentiments; applying rules that are inconsistent with precedent; inexplicably counting an employment position that two individuals shared as in favor of the

union when both employees had made unequivocal statements to the contrary; and imposing, without explanation, an extraordinary remedy—the bargaining order—in the face of circumstances that clearly call for judicial restraint.

In an attempt to reconcile its irrational application of federal labor policy, the Board purports to rely on an interpretation of the NLRA that exalts "industrial stability" as "*the ultimate goal* of the Act," (Res. Br. in opposition to *petition for cert.* at 8) (emphasis added), while utterly ignoring the goal of employee freedom of choice—an interpretation that has no basis in the Act, and which the Board, itself, applies only inconsistently and selectively.

Finally, the Board rationalizes the application of these incongruous rules as necessary to preserve its preference for formal Board-conducted elections. Again, however, the Board's inconsistent and selective application of this "preference" for formal elections (i.e. applying the preference only in the context of withdrawal of recognition, not during organizing campaigns) undermines the merits of its argument here.

ARGUMENT

I. A Board Decision That is Irrational or Inconsistent With the Purposes of the NLRA Deserves No Deference

Because Congress delegated to the NLRB primary responsibility for developing and applying the nation's labor policies, decisions of the agency are normally accorded deference.

> If the Board adopts a rule that is rational and consistent with the [NLRA], then the rule is entitled to deference from the courts. Moreover,

> if the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order.

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987). This deference is not without its limits, however. This Court has made it clear that it will not defer "to Board decisions which are irrational or inconsistent with the [NLRA]." *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 202 (1986). "These principles . . . guide [this Court's] review of the Board's action in a successorship case," 482 U.S. at 42, such as the one here.

II. The Board's Application of Federal Labor Policy in This Case is So Unreasonable and Inconsistent That the Resulting Decision Is Entitled to No Deference

The Board's decision in this case is so permeated with irrationalities and inconsistencies that it cannot possibly be considered the product of reasoned decision-making.

Two of the difficulties with the Board's decision—namely, that the Board's polling standard is irrational on its face and that the decision is inconsistent with NLRB precedent—have been briefed persuasively by Petitioner and will not be repeated at length here.

Under the Board's policy, an employer may poll its employees regarding their support for the union only when the employer has already accumulated enough evidence of employee dissatisfaction to justify unilateral withdrawal of recognition. Thus, the policy prohibits polling except when polling serves no purpose. Suffice it to say that this rule was rejected as irra-

tional by the first three circuits to consider it,[1] *see Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295 (9th Cir. 1984); *Thomas Industries, Inc. v. NLRB*, 685 F.2d 863 (6th Cir. 1982); *NLRB v. A.W. Thompson, Inc.*, 651 F.2d 1141 (5th Cir. 1981), characterized as "peculiar" by a fourth circuit court, see *NLRB v. Albany Steel*, 17 F.3d 564 (2d Cir. 1994), questioned by two Justices of this Court, see *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 797, 799 (1990) (Rehnquist, C.J., concurring; Blackmun, J. dissenting), and repudiated by one member of the Board itself, *see Texas Petrochemicals Corp.*, 296 NLRB 1057, 1064 (1989) (Chairman Stephens dissenting).

Likewise, the Board's ruling is inconsistent with its own precedent. As Petitioner points out, even if it were rational to use the same standard for polling and withdrawal of recognition, the decision in this case would be inconsistent with Board precedent. The Board previously has established a rule that an employer can withdraw recognition "*either* by showing that the union in fact lacks majority support *or* by demonstrating a sufficient objective basis for doubting the union's majority status." *Curtin Matheson Scientific*, 494 U.S. at 787 (emphasis added). *See also id.* at 800-01 (Blackmun, J., dissenting) (The Board has not purported to overrule the good-faith doubt defense); *id.* at 801 (Scalia, J., dissenting) ("The [NLRB] has established as one of the central

[1] As explained more fully by Petitioner, the polling rule is irrational because it permits employer polling only when it is pointless, its standards change when used in the context of organizing, and it encourages conduct that is contrary to the purpose of the Act.

factual determinations to be made in § 8(a)(5) unfair-labor-practice adjudications, whether the employer had a reasonable, good faith doubt concerning the majority status of the union at the time it requested to bargain.")

By requiring unequivocal proof, in the form of a head count, that a majority of bargaining unit employees no longer support the union in order to establish a reasonable good-faith doubt, the Board merges, and consequently destroys, its two-prong, disjunctive test. An administrative agency may not make policy in such a manner.

> Despite the fact that the NLRB has explicit rulemaking authority, it has chosen—unlike any other major agency of the Federal Government—to make almost all its policy through adjudication. It is entitled to do that, but it is not entitled to disguise policymaking as factfinding, and thereby to escape the legal and political limitations to which policymaking is subject. Thus, when the Board purports to find no good-faith doubt because the facts establish it, the question for review is whether there is substantial evidence to support that determination.

Curtin Matheson Scientific, 494 U.S. at 819 (Scalia, J., dissenting) (citations omitted).

The infirmity in the Board's decision does not end here, however. The two difficulties discussed above are just the vanguard in an onslaught of inconsistencies, illustrated below, which form the foundation of the Board's decision in this case.

A. The Board's Decision Is the Product of a Series of Inconsistent Rules That Simultaneously Establish a Standard and Make that Standard Unattainable

The incompatible set of rules on which the Board has relied to reach its desired result in this case already has been identified by members of this Court. As the Chief Justice noted,

> I have considerable doubt about whether the Board may insist that good-faith doubt be determined only on the basis of the sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

Curtin Matheson Scientific, 494 U.S. at 797 (Rehnquist, C.J., concurring). And Justice Blackmun agreed,

> I am also troubled by the fact . . . that while the Board appears to require that good-faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible for the employer to amass direct evidence of its workers views.

Id. at 799 (Blackmun, J., dissenting) (citation and footnote omitted).

Although this blatant inconsistency in Board policy was not the issue in *Curtin Matheson Scientific*, it cannot avoid the Court's scrutiny here, because the Board has relied too heavily on the contradictory rules in order to achieve its desired result.

One of the more telling illustrations of the absurd application of these rules in this case is found within a single paragraph of the decision of the administrative law judge (ALJ). In discounting the statement by Ron Mohr concerning widespread opposition to the union, the ALJ relied on "the Board's historical treatment of unverified assertions." (Pet. App. at 55.) This reasoning would have some meaning if the Board in fact allowed verification. But not more than a few lines down, the ALJ recognized the Board's other policy, which forbids polling employees about their sentiments until the loss of majority status is already otherwise established, or in other words, until the employer already has verification of its employees' sentiments.

Neither the ALJ nor the Board actually explicate the NLRB's historical aversion to unverified assertions. They merely indicate that it is so. This would not be especially troubling if the Board did not turn around and recount its historical *acceptance* of unverified employee assertions as a means of distinguishing other evidence in this case.

For example, in distinguishing Mohr's statement on the grounds that it is only representative of the sentiments of the pre-sale employees, the Board cites *J & J Drainage Products*, 269 NLRB 1163 (1984), where the Board relied on the *unverified* statements of a shop steward. (Pet. App. at 23.)

Likewise, in discarding the general statements concerning loss of union support made by Mohr and Bloch,[2] the Board cites *Naylor, Type & Mats*, 233

[2] The Board discounted the statement by Mohr that "with a new company, if a vote was taken, the union would lose and that it was his feeling that the employees did not want a union." (Pet. App. at 53-54.) The Board discounted Bloch's statement that "the entire night shift did not want a union." (Pet. App. at 51.)

NLRB 105 (1977), where the Board relied on more specific, but equally *unverified* assertions by two employees.[3] (Pet. App. at 24-25.)

The Board may be allowed to claim an historical aversion to unverified assertions; or, it may be permitted to claim an historical acceptance of unverified assertions; but it ought not, in the same case, be permitted to enjoy both positions without a reasoned explanation.

The Board's discussion of *Naylor* raises another disturbing inconsistency. In an effort to distinguish the instant case from *Naylor*, the Board appears to have endorsed an entirely new, yet equally irrational polling policy. The Board emphasized that in *Naylor*, "the employer could rely on remarks by two employees that they had actually taken head counts and enumerated the employees who supported and who opposed the union." (Pet. App. at 24-25.) That is a poll. The Board's preference for the *Naylor*-type poll —which was undertaken without *Struksnes* safeguards,[4] and tallied and reported without disinterested supervision—over the *Struksnes* poll which the employer conducted here, was left unexplained by the Board and is nothing short of irrational.

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[3] To the extent that the Board equates specificity with verification, its reasoning is entirely without merit. The mere recitation of employee names provides no verification for the employer that the sentiments of those employees are being reported accurately.

[4] *Struksnes Construction Co.*, 165 NLRB 1062 (1967), establishes the minimum safeguards that are required for a permissible poll. The Board acknowledged that the poll conducted by Petitioner in this case satisfied those requirements.

B. The Board Inexplicably Counted the Position Shared by Dennis Wehr and Randy Zoltack as an Employee Presumptively in Favor of the Union Even Though Both Employees Opposed the Union

The Board's treatment of the position occupied by Dennis Wehr prior to January 25, 1991, and Rudy Zoltick after that date, is especially puzzling.

Employee Dennis Wehr stated that "we didn't have to have a union because we didn't need one." (Pet. App. at 49.) The ALJ, after finding that such a statement would "properly cause an employer to doubt th[e] employee's support for the union," nonetheless discounted the evidence because Wehr quit on January 23, 1991, two days before Petitioner responded to the union's request for bargaining. (*Id.*) On the other hand, the statement by Randy Zoltack—the employee hired to replace Wehr—that "the Union was a waste of $35," (*id.* at 51), was discounted because Zoltack was hired *after* January 25, 1991.

The irrationality of the Board's conclusion regarding Wehr and Zoltack goes even deeper than its facial inconsistency, however. Because even though the Board refused to count the sentiments of either of these individuals, it nonetheless counted the employment position that they shared in determining the size of the bargaining unit.[5] Thus, not only did the Board fail to count these individuals as opposed to the union, it inexplicably counted the Wehr/Zoltack position as an employee presumptively *in favor* of the

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[5] The Wehr/Zoltack position was one of the 32 that the Board counted in the head count. This is evident from the fact that the Board used the poll results, 19 to 13, to determine the size of the bargaining unit, and the fact that Zoltack voted in the poll.

union.[6] This absurd result is explainable only as an inevitable by-product of the Board's application of contradictory and irrational rules.

C. The Issuance of a Bargaining Order Further Demonstrates The Board's Irrational Application of Federal Labor Policy

The issuance of an affirmative bargaining order, as opposed to an order to cease and desist from refusing to bargain—whether or not foreclosed from challenge by the exhaustion doctrine—nonetheless demonstrates the Board's irrational application of federal labor policy in this case.

The Court of Appeals for the District of Columbia Circuit has explained the difference between an order to cease and desist from refusing to bargain and an affirmative bargaining order. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243 (D.C. Cir. 1994).[7] The cease and desist order simply puts the parties back in the position they would have been absent any violations, and does not affect the employees right to decertify the union at a later date. The affirmative bargaining order, on the other hand, is accompanied by a prohibition against decertification. *Id.* at 1248. As a result, affirmative bargaining orders can interfere with the central protection conferred by the Act—employee free choice. *Id.; NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983).

[6] As an interesting side note, under the Board's reasoning, the Wehr/Zoltack position becomes an employee that is *conclusively* presumed to be in favor of the union. Since each is excluded on the grounds of timing, there is no statement that either could have made which would have rebutted the presumption.

[7] LPA contends that no remedies are appropriate in this case because the employer had a reasonable good-faith doubt about the union's majority status and therefore did not violate the Act by withdrawing recognition. Nonetheless, the Board's unreasonable preference for an affirmative bargaining order over a cease and desist order after finding a violation further illustrates its irrational approach to this case.

It is for this reason that the affirmative bargaining order is characterized as an extraordinary remedy which is subject to special restraints. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969) (appropriate only when employer misconduct has impaired employee free choice). It is also for this reason that courts require the Board "to explain that it has balanced the often competing interests of union protection and employee choice before issuing a bargaining order." *Exxel/Atmos*, 28 F.3d at 1248.

Thus, the Board's imposition of such an extreme remedy under the circumstances of this case is curious, because the employees have chosen freely and clearly not to be represented by the union. It is in this kind of situation that the Board must provide a well reasoned explanation.

The Board has provided no such explanation, however. Instead, it buries in a footnote the following "boilerplate" language:

> To remedy the Respondent's unlawful refusal to recognize and bargain with the Union, the judge imposed an affirmative bargaining order. In exceptions, the Respondent argues only that it did not violate the Act, not that the bargaining order is an appropriate remedy for an unlawful refusal to recognize and bargain with an incumbent union. In any event, an affirmative bargaining

> order is the standard Board remedy for such a violation.

(Pet. App. at 27) (citations omitted).

The Board's explanation is arbitrary and capricious on its face. *See e.g. Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995) (an agency explanation which consists only of boilerplate language unrelated to the specific facts of the case is arbitrary and capricious). Moreover, when considered in conjunction with the specific circumstances of this case, the explanation is blatantly irrational, for it attempts to justify the imposition of an extreme and unwarranted remedy with little more than a statement to the effect: we impose this order because we can.

III. The Board's Attempt to Justify Its Inconsistent and Irrational Decision Is Without Merit

In this case, the substantial evidence taken as a whole supports only one conclusion—that Petitioner had a reasonable, good-faith doubt about the majority support for the union. The series of inconsistent and irrational rules that the Board applied to "discredit" evidence of loss of support does not change this result. Nevertheless, even when a court is not,

> so certain of the wrongness of an agency's empirical judgment that it will be justified in substituting its own view of the facts . . . courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the basis for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed.

Curtin Matheson Scientific, 494 U.S. at 800 (Blackmun, J., dissenting).

The Board justifies its irrational approach to this case mainly on the grounds of "industrial stability." The Board relies on *Fall River Dyeing*, 482 U.S. at 39, to explain that its actions are "consistent with the statute's goal of promoting stability in bargaining relationships." (Res. Br. in Opposition to *Petition for Certiorari* at 11.) "The Board has concluded that its 'reasonable doubt' standard for polling is more consistent with the ultimate goal of the Act—stability in collective-bargaining relationships—than is the less stringent standard favored by the courts of appeals . . ." (*Id.* at 8.) The Board's rationale is unpersuasive for several reasons.

First, its reliance on *Fall River Dyeing* is misplaced. There, this Court recognized the principle that the presumption of majority support "premot[es] stability in collective bargaining relationships, *without impairing the free choice of employees.*" *Fall River Dyeing*, 482 U.S. at 39 (emphasis added). Here, however, in the name of industrial stability, the Board has applied a series of rules that clearly impair employee free choice.[8] Thus the "industrial peace" which this Court discussed in *Fall River Dyeing* in no way justifies the Board's unreasoned approach in this case.

Furthermore, although the Board purports to be guided by the principles of "industrial stability,"

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[8] Petitioner has thoroughly discussed how the Board's polling standard, when viewed in conjunction with the labyrinth of Board rules concerning decertification petitions, impairs employee free choice.

in actuality it applies only the principles of "union stability."

For example, the Board asserts that "polls, the Board has found, are 'potentially, if not inherently, both disruptive of the collective-bargaining relationship between an employer and a union and also unsettling to the employees involved . . .'." (Res. Br. in Opposition to *Petition for Certiorari* at 11.) Yet the Board's polling standard does not purport to eliminate the use of these "de-stabilizing" polls completely; it simply eliminates an employer's use of them to test an incumbent union's majority. The Board continues to permit the use of polls to measure union support during organizing campaigns. *See Mingtree Restaurant*, 736 F.2d at 1298 ("we find it incongruous for the Board to grant the right to conduct polls of union sentiment during the crucial organizing period and effectively deny that right after the union has been recognized"). The Board has not explained how polls have only this selective de-stabilizing effect.

In addition, although the Board purports to have applied the principle of "industrial stability" in determining the merits of the case, it clearly abandoned those principles in formulating a remedy. How imposing upon workers and management a relationship that neither desires will further industrial stability is nothing short of a mystery.

Finally, the Board attempts to justify its polling standard on the grounds that it "avoids an anomaly that would exist if a less stringent rule were adopted for polling . . . than that for a full scale, formal Board-conducted RM election." (Res. Br. in Opposition to *Petition for Certiorari* at 9.) Yet, again, the Board's

rule does not purport to avoid this "anomaly" completely; it only avoids it to the extent that it favors unions. For example, the Board already permits such an anomaly to exist in organizing campaigns. As discussed above, the Board permits polls to be taken to determine union support during organizing. It also allows an employer to recognize a union voluntarily without a representation election when the employer believes the union has majority support based entirely upon union authorization cards signed in the presence of union officials. Thus, in the organizing context, the Board maintains no preference for elections. On the contrary, with respect to organizing, the Board appears to be headed away from formal secret ballot elections.[9] Thus, the only real anomaly in the Board's policy is in requiring so much more to obtain a chance to test an incumbent union's status than a non-incumbent union's, whether through polling or Board-conducted elections. The Board's selective "preference" for formal elections (i.e. preferred only during challenges to incumbent unions) is unpersuasive.

The Board's selective application of the principles of "industrial stability" and "preference" for elections do not adequately reconcile or explain its irra-

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[9] For example, the Board has strongly endorsed the use of mail ballots. Testimony Before the Senate Labor and Human Resources Committee (Sept. 17, 1996), *reprinted in*, Daily Lab. Rep. (BNA) No. 181, E-4, 6 (Sept. 18, 1996) (statement of William B. Gould, IV, NLRB Chairman). In addition, the Chairman has indicated his preference for union certification based on authorization cards as opposed to certification based on secret ballot elections. William B. Kould IV, Agenda for Reform, The Future of Employment Relationships and the Law 177 (MIT Press 1993).

tional approach in this case. On the whole, the Board's actions lead to the inescapable conclusion that the decision in this case was result-driven. Alone, this is bad enough—but it is especially troubling when the imposed result is wrong, and the correct result is known—19 to 13 against the union.

CONCLUSION

For the reasons stated herein, LPA respectfully submits that the decision of the District of Columbia Circuit in this case should be reversed, and the Board's order set aside.

Respectfully submitted,

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